

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

APPEAL FROM ORDER NO.649 OF 2004

IN

NOTICE OF MOTION NO.1116 OF 2004

IN

L.C.SUIT NO.1497 OF 2004

Brihanmumbai Municipal Corporation).. Appellants

Versus

Manju Rakesh Jain and another).. Respondents

Mr.K.K.Singhvi with Mr.J.Xavier for the Appellants.

Mr.S.S.Joshi i/b.Mrs.S.S.Kamat for the Respondents.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 17TH DECEMBER 2004

P.C.:

. The present Appeal From Order has been filed against the order passed in a Notice of Motion making it absolute in terms of prayer clause (a). The trial Court has restrained the Appellants-original Defendants from taking any action in furtherance of the impugned show cause notice dated 2nd January 2004 issued under Section 351 of the Mumbai Municipal Corporation Act, 1888 and the order dated 23rd January 2004 directing the Respondents-original Plaintiffs to remove the structures mentioned in the show cause notice within fifteen days.

2. According to the Plaintiffs i.e. the

Respondents herein, a building known as "Om Palace" was constructed in 1990 and they are running a restaurant cum club on the ground floor of this building. In the Plaint, it has been stated that the building was constructed after demolishing the bungalow of one Shantabai Agarwal who was the original owner, for developing the plot. There were four adjacent structures in this plot according to the Plaintiffs admeasuring about 1500 sq.ft. in the aggregate, which were also owned by the Agarwal family and assessed by the Municipal Corporation, the Appellants herein who were the Defendants in the Suit. The Plaintiffs have claimed that these structures were in existence prior to the datum line i.e. 1st April 1962 by relying on the assessment bills for 1994-95 for the period 1st October 1994 to 31st March 1994 (sic). The Plaintiffs claim that Shantabai Agarwal had created tenancies in respect of these structures in the name of four different persons. The Plaintiffs in fact bought the entire property from the erstwhile property owner Shantabai Agarwal and constructed the building after obtaining the necessary clearance from the Corporation.

3. It appears that, on 16th December 2003, when the Officers of the Corporation visited the site, they have found that the Plaintiffs had unauthorisedly extended the building by "brick masonry walls and ladhi koba

roof" right upto the road without leaving any open space as required. Accordingly, a notice under Section 351 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as "the Act") was issued to the Plaintiffs on 2nd January 2004 and the Assistant Municipal Commissioner by his order dated 23rd January 2004 directed the Plaintiffs to remove the structures within fifteen days. The Assistant Commissioner has noted that the Plaintiffs had not submitted any documents along with their reply to prove that the notice structure was authorised or in existence prior to the datum line i.e. 1st April 1962.

4. The Plaintiffs, therefore, filed a Suit before the Bombay City Civil Court being Suit No.1497 of 2004. The Plaintiffs also preferred Notice of Motion being Notice of Motion No.1186 of 2004. Ad-interim relief was granted to the Plaintiffs which was then confirmed by the impugned order dated 7th May 2004.

5. Mr.K.K.Singhvi, learned Counsel for the Appellants, submits that the trial Court ought not to have granted any injunction when there were no documents at all filed by the Plaintiffs to establish the fact that the offending structure was in existence prior to the datum line or that the Plaintiffs had acquired permission to put up such a structure. He submits that

when the Plaintiffs had not proved authorisation of the extension as stated in the notice issued by the Corporation under Section 351 of the Act, the Plaintiffs ought not to have been granted any interim relief. He further submits that the assessment bills relied on by the Plaintiffs do not indicate that the structures were in existence when the building plans were approved nor were they in existence when the occupation certificate was issued. According to the learned Counsel, although the building had been constructed as per the plans submitted and, therefore, the occupation certificate has been issued, the Plaintiffs thereafter extended the existing building by building a brick masonry wall which abuts directly on to the road without leaving the open space as required. Mr.Singhvi produced the occupation plan which has been submitted by the Architect of the Plaintiffs and counter-signed by the Plaintiffs. According to him, it was only after inspection of the site that this plan was approved and an occupation certificate was issued in 2001. He submits that there is no evidence on record to indicate that the structures were still in existence when the occupation plan was issued.

6. Mr.Joshi for the Plaintiffs submits that the notice issued under Section 351 of the Act is faulty since there has been no addition or alternations to the

existing structures, namely, the four tin sheds. He submits that the Plaintiffs are running their allied business activities on the ground floor in these four structures and, therefore, the notice issued is illegal. Furthermore, he submits that the Plaintiffs have also not contravened the provisions of Section 342 of the Act and, therefore, the notice issued is illegal. He urges that if the structures were in existence prior to 1962 as shown from the assessment bills of 1994, the interim relief granted by the trial Court should not be disturbed. He submits that the Plaintiffs have only carried out internal renovation within these four structures without removing any load bearing walls or beams and, therefore, no unauthorised or illegal work has been carried out on the premises.

7. On a perusal of the occupation plan, it is obvious that the four structures were not in existence when the plan was approved. The four structures prima facie must have been demolished after 1994 and, therefore, the FSI which was granted for construction of the building obviously included the FSI of the entire property and not just the vacant land excluding the four structures. That being the position, it is difficult to accept the submission of the Plaintiffs that there is no extension to the existing building. Had the four structures been in existence as claimed by the

Plaintiffs when the plans were sanctioned, they would have been indicated in the plan itself. Mr. Joshi attempted to submit that since the occupation plan which was produced before me by the Corporation was only of the building and not the entire property, the question of indicating the four structures on this plan would not arise. This submission is unsustainable. The plan is of the completed building, showing the area statement, etc. It also indicates the set back area calculation and other necessary details for issuance of an occupation certificate. The plan also depicts that a 15 feet free space has been maintained between the building and the roadline. It is impossible that existing structures would not be depicted in such a detailed plan. There is nothing on record to indicate that the structures were in existence when the plan was sanctioned on 17th August 2001. The Plaintiffs have conveniently produced the assessment bills only of 1994-1995 and not a recent bill.

8. Furthermore, the trial Court while considering the issue has erroneously observed that the Plaintiffs could not be in possession of the sanctioned plan because they were not owners of the property. The Plaintiffs admittedly have bought over the entire property. They have constructed a building after demolishing the existing structures and are now running

a restaurant and club known as ONEX on the ground floor of the building as well as the extended portion.

9. The submission of Mr.Joshi that the notice issued under Section 351 of the Act is not maintainable also cannot be accepted. Section 351 stipulates that if there is erection of any building or the execution of any work as described in Section 342, a notice can be issued by the Corporation if such work is unauthorised. Section 342 requires every person who intends to make any addition to a building or change of existing user to give a notice to the Commissioner of his intent to do so. The extension of the building as alleged by the Corporation would no doubt be brought within the purview of Section 342(a). As no notice was given by the Plaintiffs of their intent to make an addition to the building, the notice was issued under Section 351. Therefore the submission of the learned Advocate for the Plaintiffs that the notice under Section 351 is illegal cannot be accepted.

10. For the foregoing reasons, the impugned order of the trial Court is set aside. Notice of Motion dismissed. Appeal From order allowed.

11. In view of the Appeal From Order being disposed of, nothing survives in Civil Application No.874 of 2004

and the same is disposed of accordingly.

12. Mr.Joshi seeks stay of this order. Mr.Xavier vehemently opposes the stay. However, in view of the fact that there has been a stay order in operation till today, this order is stayed for a period of eight weeks.

13. Certified copy expedited.